Case No. 48935-0-II

IN THE COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent,

vs.

DALE SMITH,
Defendant/Appellant.

Appeal from the Superior Court of Mason County

Superior Court Case No. 16-1-00005-21

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

TABLE OF AUTHORITIES

Table of Cases

Cases

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

Table of Statutes

Table of Other Authorities

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove the element of intent to commit assault beyond a reasonable doubt because
   a. the State presented evidence that the Defendant was too intoxicated to form intent in that he was "incapacitated or gravely disabled by alcohol."
   b. the State presented no evidence that the defendant could form the required intent despite his level of intoxication.
   c. the State presented no evidence that the defendant intended to commit an assault.
2. The jury instructions were confusing in that they
   a. did not clearly communicate to the jury that the State was required to prove the element of intent to commit an "assault" beyond a reasonable doubt and thereby relieved the State of its burden to prove each element.
   b. misled the jury as to whether evidence of voluntary intoxication could be ignored.
   c. pretrial instructions to the jury differed significantly for the "to convict" instruction in that the latter failed to include intent.
3. The defense attorney failed to provide effective assistance because
   a. he failed to provide evidence that Mr. Smith was too intoxicated to form the intent necessary to commit an assault.
   b. he failed to raise the issue of the arresting officer placing the defendant in protective custody pursuant to RCW 70.96A.120(2), which requires that the defendant be "incapacitated or gravely disabled by alcohol" and unable to form the requisite intent.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether law enforcement had placed the defendant in protective custody pursuant to RCW 70.96A.120(2).
2. Whether testimony placing the defendant in protective custody pursuant to RCW 70.96A.120(2) is an admission by the State that the defendant was "incapacitated or gravely disabled by alcohol" and therefore incapable of forming the necessary intent to commit assault.
3. Whether the instructions as given to the jury were confusing and improperly relieved the State of its burden to prove intent to commit assault beyond a reasonable doubt.
4. Whether assault requires the state to prove intent to commit assault beyond a reasonable doubt.

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360-551-0782

5. Whether the "to convict" instruction failed to properly include the intent requirement for assault.
6. Whether the failure by the defense attorney to present evidence that the defendant was too intoxicated to form intent to commit assault was ineffective assistance of counsel when voluntary intoxication is the sole theory of the case.
7. Whether the failure by the defense attorney to raise the issue of RCW 70.96A.120(2) to it as the basis of the law enforcement seizure of the defendant and evidence of defendant's inability to form intent when voluntary intoxication is the sole theory of the case.

STATEMENT OF THE CASE

On New Year's Eve 2015, and New Year's Day 2016, the Appellant, Daniel Smith, was visiting his former brother-in-law, Jared Collins. VRP at 101. Mr. Smith and Mr. Collins began drinking in the yard outside. Although Mr. Smith was not known to drink much, on this particular night he began drinking a lot, much more than Mr. Collins had seen before. Although Mr. Smith became intoxicated, he was initially behaving well. VRP at 103. Because Mr. Smith was staying the night, the party moved inside to watch TV. Some time thereafter, Mr. Smith went to use the restroom. As Mr. Collins waited for Mr. Smith to return, he heard him fall. When Mr. Collins checked on Mr. Smith, he found Mr. Smith unconscious on the bathroom floor. Mr. Collins dragged Mr. Smith to the living room and placed him on the couch. Mr. Collins checked Mr. Smith's pulse and initially found it to be strong, but it quickly slowed down to the point that Mr. Collins could not feel it. Fearing the worst, Mr. Collins had his wife call 9-1-1. VRP at 104. Mr. Collins attempted to rouse Mr. Smith as they waited for the Emergency Medical Technicians (EMT) to arrive.

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360-551-0782

Eventually, Mr. Smith regained consciousness about the same time the EMT arrived. However, Mr. Smith's demeanor had changed noticably. Mr. Smith exhibited "really bad mood swings." VRP at 105. Because of Mr. Smith's condition, the EMT wanted him to go to the hospital; however, Mr. Smith repeatedly stated that he did not want to go to the hospital. Mr. Smith also stated that he wanted to shoot himself. VRP at 106. As a result, EMT requested law enforcement to assist. Record at 5.

In response to the request for assistance, Officer Scrivner arrived on the scene around 3:00 a.m. and found Mr. Smith sitting on the couch talking to fire personnel. VRP at 29. Officer Scrivner testified that Me. Smith was "quite intoxicated." Officer Scrivner attempted to convince Mr. Smith to go to the hospital because he "was concerned for his welfare." VRP at 30 - 31. When Deputy Schlecht and Deputy Andersen arrive at the home, Deputy Schlecht takes over the discussion with Mr. Smith because they know each other. Deputy Schlecht attempted to get Mr. Smith to agree to go to the hospital; but, Mr. Smith declined numerous times. VRP at 31, 39, 57, 58, 66, 81. Mr. Smith threatened suicide, but never threatened any of the officers. VRP at 40. Mr. Smith would also change his mind about going to the hospital. VRP at 31, 32, 41, 57, 81. Although the officers attempted to get Mr. Smith to agree to go to the hospital, they stated that Mr. Smith had no choice because of his intoxicated condition and statements he had made about killing himself. VRP at 57; 67 - 68; 74 - 75. Eventually, Deputy Schlecht was able to convince Mr. Smith to go to

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360-551-0782

the hospital with the fire personnel. Mr. Smith was so intoxicated that he had to be assisted by three officers to prevent him from falling. VRP at 32 - 33; 40; 57 - 58. Once outside, they attempted to force Mr. Smith onto the gurney. VRP at 33. However, as the officers attempted to restrain Mr. Smith on the gurney, he again changed his mind. Mr. Smith finally agreed to go to the hospital if the officers would allow him to urinate first. VRP at 34. The officers discussed this and agreed to let Mr. Smith urinate in the bushes if he agreed to go to the hospital. The officers then had the restraints removed, and two of the officers then helped Mr. Smith walk to the bushes. VRP at 34; 81-82. After urinating in the bushes that are about 10 to 15 feet away from the gurney (VRP at 35), Mr. Smith experienced another mood change and announced that he did not want to go to the hospital. Officer Scrivner and Deputy Schlecht then recounted that Mr. Smith, who was unable to walk on his own, "lunged toward Deputy Schlecht and kind of hit him with his shoulder" and attempted to grab the deputy's gun. VRP at 35; 61 - 62. Deputy Schlecht and Deputy Anderson testified that Mr. Smith announced that he wanted to see the deputy's gun. VRP at 59, 60, 84. However, the other witnesses do not mention this statement. At this point, the officers took Mr. Smith to the ground and placed him in hand cuffs. Officer Scrivner reported that Mr. Smith was not acting as "a normal person would do in that situation." VRP at 37. Mr. Smith was then transported to the hospital and then to jail.

Jared Collins' testimony was nearly identical with that of the police

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Belfair, WA 98528
360-551-0782

officers up until the alleged assault. Mr. Collins agreed with Officer Scrivner that the take down occurred at the gurney. VRP at 116 - 117. However, Mr. Collins reported that the officers were attempting to put Mr. Smith back on the gurney when Mr. Smith "fell forward" into one of the officers and that when this happened, the officer said "He's trying to go for my gun." VRP at 117. Mr. Collins reported he had filmed the event on his cell phone, but had deleted it because he didn't think Mr. Smith was in any trouble. VRP at 108. Deputy Schlecht verified this stating that he asked Mr. Collins to keep the video and that he would be back to retrieve it; however, Deputy Schlecht did not get back with Mr. Collins to retrieve the video. VRP at 132.

Mr. Smith testified on his own behalf. Mr. Smith testified that he had been under a lot of stress prior to the incident. He had lost his house, his mother had died, and a breakup with his girlfriend when he lost the house. Mr. Smith stated that he wanted to "forget about all the stuff I was dealing with and just enjoy the night." VRP at 122. Mr. Smith testified that he did not remember what happened after he went into the house shortly before passing out in the bathroom. VRP at 124. Mr. Smith's next recollection was when he "woke up in the jail." VRP at 125.

Mr. Smith was charged with assault in the third degree in that he acted with the "intent to prevent or resist" an officer "and/or (2) did intentionally assault a law enforcement officer." VRP at 16; Record at 4. After a jury trial, Mr. Smith was found guilty. Mr. Smith now appeals his

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Belfair, WA 98528
360-551-0782

conviction.

ARGUMENTS

I. There was insufficient evidence to support a conviction because the State failed to prove beyond a reasonable doubt that Mr. Smith could form the intent to commit an assault.

1. Standard of review.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green,* 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin,* 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. *State v. Theroff,* 25 Wash.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wash.2d 385, 622 P.2d 1240 (1980)." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). However, the State is not entitled to inferences where none exist.

"The State must prove each element of a crime beyond a reasonable doubt." *State v. Strong*, 272 P.3d 281, 167 Wn.App. 206, 210 (Wash.App. Div. 3 2012) citing *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "The State always has the burden of proving the defendant acted with the necessary culpable mental state." *State v.*

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360-551-0782

Coates, 107 Wn.2d 882, 890, 735 P.2d 64 (1987). This is also true where the defendant claims he was too intoxicated to form the necessary culpable mental state. Since voluntary intoxication is not an affirmative defense, the "defendant is not required to present expert testimony to establish that he or she was too intoxicated to form the necessary mental state. *State v. Gabryschak*, 83 Wn.App. 249, 253, 921 P.2d 549 (Div. 1 1996) citing *State v. Thomas,* 109 Wash.2d 222, 231, 743 P.2d 816 (1987). Nor is the State required disprove voluntary intoxication beyond a reasonable doubt. *State v. Coates*, at 889 - 890. However, the State must still prove beyond a reasonable doubt that Mr. Smith formed the necessary culpable mental state. In cases such as this, it is insufficient for the State to ignore the element of intent and simply rely on the fact that the other elements of assault are present. Doing so would be a failure to prove every element of the charged crime beyond a reasonable doubt. _____.

2. Assault requires intent to commit the crime of assault.

Mr. Smith was charged with Assault in the Third Degree. In the current case, the Information that was filed by the Lewis County prosecutor on January 4, 2016, stated the following:

> On or about the 1st day of January, 2016, in the County of Lewis, State of Washington, the above-named defendant, (1) with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or herself or another person, did assault another; and/or (2) did intentionally assault a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; contrary to the Revised

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360-551-0782

Code of Washington 9A.36.031(1)(a) and/or (g).

Record at 1. The Information lists two separate grounds for the assault charge, both of which contain elements that require the element of intent. The intent element required for the first accusation under RCW 9A.36.031(1)(a) is the "intent to prevent or resist the execution of any lawful process." The intent element required for the second, RCW 9A.36.031(1)(g), is listed in the information as the intent to commit an assault. The trial court confirmed that intent was required for both in its comments to prospective jurors. The Superior Court stated:

> The defendant is charged by a document called an Information charging him with assault in the third degree in that on or about January 1st, in Lewis County, the defendant, with ***intent to prevent or resist*** the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of him or herself or another person, did assault another and/or (2) did ***intentionally assault*** a law enforcement officer or other employee of a law enforcement agency who was performing his official duties at the time of the assault.

VRP at 16 (emphasis added).

However, intent is also required for the element of assault itself. In Washington assault is a specific intent crime. Thus:

> To obtain a conviction for third degree assault under RCW 9A.36.031(1)(g), the State most prove that [the defendant] intended to, and actually did, commit an assault against a law enforcement officer performing law enforcement duties at the time of the assault. *State v. Brown,* 140 Wash.2d 456, 468, 998 P.2d 321 (2000). Because "assault" itself is not defined in the statute, we resort to the common law for its definition. *State v. Byrd,* 125 Wash.2d 707, 712, 887 P.2d 396 (1995). In order to commit assault, a person must have specific intent to cause bodily harm or to create an apprehension of bodily harm. *Byrd,* 125 Wash.2d at 713, 887 P.2d 396. Specific intent can be inferred as a logical probability from all the facts and

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Belfair, WA 98528
360-551-0782

> circumstances. *State v. Pedro*, 148 Wash.App. 932, 951, 201 P.3d 398 (2009) (citing *State v. Louther*, 22 Wash.2d 497, 502, 156 P.2d 672 (1945)).

State v. Skuza, 156 Wn.App. 886, 235 P.3d 842 (Div. 2 2010). Washington appellate courts have held that every assault requires the element of intent. Intent is a non-statutory element of assault. *State v. Finley*, 97 Wn.App. 129, 135, 982 P.2d 681 (Div. 3 1999) citing *State v. Brown*, 94 Wash.App. 327, 972 P.2d 112 (1999); *State v. Allen*, 67 Wash.App. 824, 826, 840 P.2d 905 (1992); WPIC 35.50. Under the common law, an assault is an intentional act. *State v. Allen*, 67 Wn.App. 824, 826, 840 P.2d 905 (Div. 3 1992) citing *State v. Mathews*, 60 Wash.App. 761, 766-67, 807 P.2d 890 (1991); *State v. Sample*, 52 Wash.App. 52, 757 P.2d 539 (1988); *State v. Jones*, 34 Wash.App. 848, 664 P.2d 12 (1983). An allegation of assault contemplates knowing, purposeful conduct. *Id.* citing *State v. Hopper*, 118 Wash.2d 151, 822 P.2d 775 (1992). As a result, all assaults require that the accused have the specific criminal intent to commit the assault. "Assault is not, in and of itself, a strict liability crime; rather, the *mens rea* of assault is the intent to commit a battery or to create apprehension of harm." *State v. Brown*, 94 Wn.App. 327, 342, 972 P.2d 112 (Div. 1 1999).

The two sections cited by the State in the Information, RCW 9A.36.031(a) and RCW 9A.36.031(g), and relied on by the trial court read as follows:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
> (a) With intent to prevent or resist the execution of any

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> lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or
>
> (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

The first section, RCW 9A.36.031(a), thus requires two specific forms of intent -- first the intent to commit the assault; and second, the intent to "prevent or resist." The second section, RCW 9A.36.031(g) requires only the intent to commit the assault. There is no requirement of "intent" of knowledge that the assault be against a law enforcement officer. It is only required that the person being assaulted was "a law enforcement officer . . . who was performing his or her official duties at the time of the assault." RCW 9A.36.031(g). However, both sections require that the defendant have the specific intent to commit an assault.

3. The State failed to prove that the defendant formed the required intent to commit an assault.

The State must prove that Mr. Smith had "specific intent to cause bodily harm or to create an apprehension of bodily harm." *State v. Skuza*, citing *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Because "intent" is an essential element of the assault element of the alleged crime, the State must prove "specific intent either to create apprehension of bodily harm or to cause bodily harm" beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). This is true for both RCW 9A.36.031(a) and RCW 9A.36.031(g) if the State fails to prove this intent, Mr. Smith cannot be convicted. However, the State failed to show

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any evidence of intent and the evidence presented by the State showed that Mr. Smith was too intoxicated to act intentionally to commit a crime.

In Washington voluntary intoxication is available to show that a defendant was unable to form the necessary intent to commit a crime. RCW 9A.16.090 reads:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

This concept was relayed to the jury as follows:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Jury Instruction No. 7, Record at 67. Voluntary intoxication is not an affirmative defense. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). Nor does RCW 9A.16.090 "add another element to the offense." *State v. Fuller*, 42 Wn.App. 53, 55, 708 P.2d 413 (Div. 1 1985). However, it is not something that the jury is simply free to ignore as the instruction implies can be done when it states voluntary intoxication "may be considered." Further, the State is not relieved from its "burden of proving the defendant acted with the necessary culpable mental state." *State v. Coates*, at 890. "Rather, evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability." *State v. Coates*, at

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Belfair, WA 98528
360-551-0782

889. Voluntary intoxication is used in assessing a defendant's mental state; however, "the statute does not require that consideration to lead to any particular result." *State v. Coates*, at 889 - 890. By using the words "may be considered" the legislature was not giving the court/jury the option to ignore voluntary intoxication, rather it was saying that a not guilty verdict is not required simply because a defendant might be intoxicated. Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state. The question is whether the defendant was so intoxicated that "a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state." *State v. Gabryschak*, 83 Wn. App. 249, 254, 921 P.2d 549 (1996) (citing *State v. Rice*, 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984)). "The State always has the burden of proving the defendant acted with the necessary culpable mental state." *State v. Coates*, at 890.

4. The evidence presented by the State shows that Mr. Smith could not and did not form the requisite intent to commit an assault.

In the current case, there was substantial evidence that Mr. Smith was extremely intoxicated. Mr. Smith was so intoxicated that EMT had been called to provide medical assistance. Mr. Smith had threatened to kill himself. Mr. Smith had "red blood shot, watery eyes, and smelled heavily of intoxicants." Mr. Smith had difficulty walking without assistance and exhibited evidence of mood swings. Record at 5 - 7. As a result, the trial

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Belfair, WA 98528
360-551-0782

court properly allowed the voluntary intoxication instruction. However, the evidence presented at trial proved that Mr. Smith could not form the specific intent to commit an assault.

At trial, there was an extraordinary amount of testimony regarding the extreme intoxication of Mr. Smith and why officers were concerned for his physical and mental wellbeing. VRP, generally. EMT had been called because Mr. Smith had passed out, fallen, and his pulse was difficult to find. VRP at 104. Mr. Smith's level of intoxication was so severe that Detective Schlecht determined that he had to be taken to the hospital against his will as required by the "involuntary treatment act." VRP at 57. The level of intoxication necessary to justify such a step is significant.

The following excerpts from Detective Schlecht's demonstrate the reasoning for this conclusion.

> Q And why did you want him to go to the hospital at this point?
> A Because I felt that he was ***unable to take care of himself due to his level of intoxication*** as well as the statements he made of wanting to harm himself.
> Q So then what happened?
> A He agreed to go to the hospital. Myself and Deputy Andersen helped him up from the couch. We then walked him outside to where the gurney, the fire department's gurney, was waiting. So I'm on one side of him, Deputy Andersen is on the other side. We're holding onto his arm walking him out. We walk him down, I believe there's one or two steps, go out, sit him on the gurney. At the end he becomes a little bit combative.
> ***I was telling him he's going to go to the hospital because it's an involuntary treatment act. Basically he's unable to take care of himself. He's made suicidal statements. He has means to carry out this threat***, i.e., a firearm as well as he claims he had some pills of his mother's, morphine pills. So we explained to him

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360-551-0782

that he needs to go to the hospital.

VRP at 57 - 58 (emphasis added).

> Q Now, earlier you had indicated that he needed to go to the hospital because of suicidal ideations; is that correct?
> A Correct.
> Q Were there any other health concerns that you were worried about?
> A ***His level of intoxication, the fact that witnesses stated that he had passed out in the bathroom***, he urinated on himself. Just his level of intoxication and then ***the suicidal statements*** led us to all agree that he needed to go to the hospital for treatment.
> Q Sure. And was one of the concerns maybe that he may have been suffering from alcohol poisoning or...
> A I'm not a -- I don't -- I'm not a medical doctor, but, yes, he was to the point where ***he wouldn't have been able to take care of himself. He would have passed out. Bad stuff could have happened.***

VRP at 67 - 68 (emphasis added).

> ***Q So did he have a choice? If he had said no, he did not want to go to the hospital --***
> ***A No, he did not. He would have gone to the hospital.***
> ***Q Why?***
> ***A Because based on the circumstances we had, his suicidal comments, the fact that we had a witness stating that he had a gun*** in his car, and he actually told me his gun was in his truck that was parked in the driveway, and that he wanted to -- he made statements he wanted to go home and take his mother's morphine. And ***his level of intoxication was so extreme that I don't believe he would have been able to take care of himself, and that he had also -- there'd also been statements that he passed out in the bathroom***. I don't know for how long. So we came to the conclusion that he needed to go to the hospital and he needed to get help, treatment.
> ***Q Even if it was involuntarily?***
> ***A Yes.***

VRP at 74 - 75 (emphasis added). Detective Schlecht specifically states that Mr. Smith had no choice, but to go to the hospital and that this was because of the "involuntary treatment act." VRP at 57. Although Detective

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Belfair, WA 98528
360-551-0782

Schlecht did not say so directly to Mr. Smith, the officer has placed Mr. Smith in protective custody because Mr. Smith had to go to the hospital against his whish not to go to the hospital. Mr. Smith was being forced to go to the hospital despite his expressed desire to the contrary. See VRP at 31, 33-34, 39, 41, 57, 58, 66. The Supreme Court has ruled that a seizure occurs when the person is no longer free to leave and the Fourth Amendment applies. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Because Mr. Smith had no choice in the matter he was legally seized by law enforcement when Detective Schlecht informed Mr. Smith of the fact. VRP at 57. If Mr. Smith was unable to understand that he had been seized after being told of that fact, then he necessarily lacked mental capacity to understand the situation due to his voluntary intoxication and Detective Schlecht acted properly placing him in protective custody pursuant to RCW 70.96A.120(2). However, if Mr. Smith had the mental capacity to understand the situation and care for himself, then Detective Schlecht lacked authority to take Mr. Smith into protective custody under RCW 70.96A.120(2) and effectively placed Mr. Smith under arrest without probable cause. "The lawfulness of an arrest stands on the determination of whether probable cause supports the arrest." *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) citing *State v. Potter,* 156 Wash.2d 835, 840, 132 P.3d 1089 (2006).

"Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution, a police

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360-551-0782

officer generally cannot seize a person without a warrant supported by probable cause." *State v. Z.U.E.*, 178 Wn.App. 769, 779, 315 P.3d 1158 (2014), *aff'd*, 183 Wn.2d 610, 352 P.3d 796 (2015). "'As a general rule, warrantless searches and seizures are per se unreasonable.'" *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)); *State v. Chrisman*, 100 Wn.2d 419, 422 (1984); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). However, the rule is subject to exceptions. *Z.U.E.*, 178 Wn.App. at 779. One exception is the investigative stop, commonly referred to as a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). "The burden is always on the [S]tate to prove one of these narrow exceptions." *State v. Ladson*, 138 Wn.2d at 350; *State v. Williams*, 689 P.2d 1065, 102 Wn.2d 733, 736 (Wash. 1984). The State has the burden to prove that a warrantless seizure was lawful if it falls into one of the recognized exceptions to the constitutional warrant requirement. *State v. Yoder*, 779 P.2d 1152, 55 Wn.App. 632 (Wash.App. Div. 2 1989); *State v. Williams*, 102 Wn.2d 733, 736 (1984). The standard of proof is clear and convincing evidence for all exceptions to the warrant requirement, including investigative detentions. *See, State v. Doughty*, 239 P.3d 573, 170 Wn.2d 57, 62 (2010); *State v. Garvin*, 166 Wn.2d 242, 250 (2009). Further, an "objective standard is used to determine whether the officer's suspicion of criminal activity was reasonable in light of the specific facts and

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Belfair, WA 98528
360-551-0782

circumstances known to the officer at the time of seizure." *State v. O'Neill*, 62 P.3d 489, 148 Wn.2d 564, 598 (Wash. 2003) citing *State v. Kennedy,* 726 P.2d 445, 107 Wn.2d 1, 5 - 8 (Wash. 1986). In this case, Mr. Smith had done nothing wrong and Detective Schlecht did not arrest Mr. Smith for any crime until well after Mr. Smith had already been seized, nor had Mr. Smith been detained for the investigation of a crime. At the time Mr. Smith was seized, Detective Schlecht did not have a "suspicion of criminal activity" because Mr. Smith was merely intoxicated on private property[1] and Detective Schlecht testified that his only concern was due to Mr. Smith's level of intoxication. Further, the State made no allegation and provided no evidence to justify an exception to the probable cause requirement except for the evidence that justify protective custody under RCW 70.96A.120(2). As a result, the seizure and detention of Mr. Smith was unlawful unless it was authorized by RCW 70.96A.120(2).

The authority and requirement for placing someone in protective custody and forcing them to go to the hospital is found in RCW 70.96A.120(2) which reads:

> (2) Except for a person who may be apprehended for possible violation of laws not relating to alcoholism, drug addiction, or intoxication and except for a person who may be apprehended for possible violation of laws relating to driving or being in physical control of a vehicle while under the influence of intoxicating liquor or any drug and except for a person who may wish to avail himself or herself of the provisions of RCW 46.20.308, ***a person who appears to be incapacitated or gravely disabled by alcohol*** or other drugs and who is in a public place or who has ***threatened, attempted, or inflicted***

[1] Mr. Smith was on the property legally by invitation and was spending the night. VRP at 103 - 104.

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> ***physical harm on himself***, herself, or another, ***shall be taken into protective custody*** by a peace officer or staff designated by the county and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment. If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons. The peace officer or staff designated by the county, in detaining the person and in taking him or her to an approved treatment program, is taking him or her into protective custody and ***shall make every reasonable effort to protect his or her health and safety***. In taking the person into protective custody, the detaining peace officer or staff designated by the county may take reasonable steps including reasonable force if necessary to protect himself or herself or effect the custody. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

RCW 70.96A.120(2) (emphasis added). This is the section Detective Schlecht was referring to when he testified that Mr. Smith had to go to the hospital because of the "involuntary treatment act." According to RCW 70.96A.120(2) an intoxicated person must "be taken into protective custody by a peace officer" when he "appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself."[2] Mr. Smith was not in a public place, but he had threatened to kill himself. As a result, Detective Schlecht was required to place Mr. Smith in protective custody, which he did when he told Mr. Smith he had to go to the hospital because of the "involuntary treatment act." VRP at 57 - 58, 67

[2] Once the officers determined that Mr. Smith met the requirements of RCW, they were required to place him in protective custody and in so doing they created a take charge relationship that created "an affirmative duty to provide for [defendant's] health, welfare, and safety." *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 639 - 640, 244 P.3d 924 (2010). This relationship included the duty to take reasonable steps to ensure the Mr. Smith, who was unable to form criminal intent due to his level of intoxication, did not commit a crime while in their custody.

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- 68. Additionally, the level of intoxication that gives rise to the requirement to place someone in protective custody, "incapacitated or gravely disabled by alcohol," is defined by statute. RCW 70.96A.020 states:

> (11) "Gravely disabled by alcohol or other psychoactive chemicals" or "gravely disabled" means that a person, as a result of the use of alcohol or other psychoactive chemicals: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by a repeated and escalating loss of cognition or volitional control over his or her actions and is not receiving care as essential for his or her health or safety.
> (13) "Incapacitated by alcohol or other psychoactive chemicals" means that a person, as a result of the use of alcohol or other psychoactive chemicals, is gravely disabled or presents a likelihood of serious harm to himself or herself, to any other person, or to property.

Detective Schlecht gave testimony that verified that each of these grounds were part of the basis for his decision to place Mr. Smith in protective custody. Because of his intoxication, Mr. Smith was in "danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety." VRP at 57 - 58, 67 - 68. Mr. Smith was not "in the right frame of mind" to take care of himself. VRP at 76. Mr. Smith exhibited mood swings (VRP at 80, 83, 89). Mr. Smith threatened to kill himself. VRP at 74 - 75. The officers testified that Mr. Smith "was heavily intoxicated . . . not just intoxicated" which was beyond normal. VRP at 37, 90. Mr. Smith had also lost consciousness and could pass out again. VRP at 67 - 68. Essentially, Mr. Smith was experiencing "a

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repeated and escalating loss of cognition or volitional control over his or her actions." The Detective clearly felt that Mr. Smith was "gravely disabled by alcohol," and properly decided that Mr. Smith had no choice but to go to the hospital, thereby placing Mr. Smith in protective custody. VRP at 57. These same reasons show that Mr. Smith was incapacitated because Mr. Smith could not care for himself and his "frame of mind" was such that he could not think rationally. Mr. Smith was gravely disabled and had also demonstrated through his threats to kill himself that there was "a likelihood of serious harm to himself" and/or others. When this information is taken into consideration, it is clear that Mr. Smith was so intoxicated that he could not form the intent to commit an assault.

Detective Schlecht's determination that Mr. Smith was so intoxicated that he had to be placed in protective custody is an admission by the State that Mr. Smith lacked the ability to form the specific intent to commit an assault. If Mr. Smith were capable of forming the required criminal intent, he would not have been "incapacitated or gravely disabled by alcohol" and Detective Schlecht would not have had the authority to place Mr. Smith in protective custody and force him to go to the hospital. If Detective Schlecht did not have the authority to act under RCW 70.96A.120(2), then his actions on January 1, 2016, would amount to an unlawful arrest. *State v. Z.U.E.*, 779. This is because Mr. Smith had done nothing illegal at the time he was place in custody; he was only intoxicated on private property and Detective Schlecht had no probable

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cause to arrest Mr Smith.

Mr. Smith was seized by the officers prior to the time of the assault. Detective Schlecht had determined that Mr. Smith was not free to leave or refuse to go to the hospital. VRP at 74 - 75. And Detective Schlect told Mr. Smith "he's going to go to the hospital because it's an involuntary treatment act." VRP at 57. Mr. Smith was no longer free to leave and was now seized. *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). At this point in time, the only justification for the seizure is RCW 70.96A.120(2) which requires Mr. Smith to be "incapacitated or gravely disabled by alcohol." To justify Detectives seizure under RCW 70.96A.120(2) the State had to show that Mr. Smith was incapable of forming the criminal intent to commit an assault. As a result, the only evidence presented by the State relating to his mental state was that Mr. Smith could not form the required intent to commit an assault at the time due to the fact that he was "incapacitated or gravely disabled by alcohol." In such a case, the State has failed to meet its burden and prove the necessary element of intent and Mr. Smith is entitled to an acquittal. *State v. Byrd,* 125 Wash.2d 707, 713, 887 P.2d 396 (1995). Conversely, if Mr. Smith was capable of forming the requisite intent despite his sever intoxication, then the arrest was unlawful and a violation of his constitutional rights.

After presenting evidence that Mr. Smith was placed in protective custody because he was "incapacitated or gravely disabled by alcohol," the

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State provided no evidence to show that Mr. Smith was able to or did form the intent to assault the officers or commit any other crime. In Mr. Smith's case, the State did not call any EMT to testify on Mr. Smith's state of intoxication. Nor did the State provide any evidence to contradict the conclusion of Detective Schlecht that Mr. Smith needed to be placed in protective custody as required by RCW 70.96A.120(2). As a result, the State provided the evidence that proves Mr. Smith was too intoxicated to form intent and the State failed to show that Mr. Smith could form the requisite intent under any standard. The Court should, therefore, overturn Mr. Smith's conviction and dismiss the charges.

II. The jury instructions were confusing as given and relieved the State of its burden to prove the element of intent.

If a jury instruction allows "the jury to assume that an essential element need not be proven, then this error is of constitutional magnitude, which we will review despite his failure to object." *State v. Goble*, 131 Wn.App. 194, 203, 126 P.3d 821 (Div. 2 2005). In the current case, the jury instructions did not require the State to prove that Mr. Smith had the specific intent to commit an assault. The instructions allowed the jury to ignore evidence of intent and/or explain the level of intoxication that would prevent a suspect from forming the requisite criminal intent. This prevented the jury from properly considering Mr. Smith's theory of the case.

Washington Courts:

review jury instructions de novo, and an instruction containing an

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> erroneous statement of the law is reversible error where it prejudices a party. *Cox v. Spangler,* 141 Wash.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hue v. Farmboy Spray Co.,* 127 Wash.2d 67, 92, 896 P.2d 682 (1995). The court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Jackman,* 156 Wash.2d 736, 743, 132 P.3d 136 (2006).

Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 634, 244 P.3d 924 (2010).

Jury instructions are only proper if "they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (Div. 2 2009). "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." *Id.*, at 641 - 642, citing *State v. Pirtle,* 127 Wash.2d 628, 656, 904 P.2d 245 (1995). The jury instructions as given in this case were confusing and had the result of releasing the prosecution from proving all the elements of the charge crime. When an instruction has the effect of removing the need to prove a required element, the issue may be raised on appeal even when there is no objection to the instructions. *State v. Goble*, at 203.

The jury was given five instructions dealing with assault and the required intent. Jury Instruction No. 3 defined the crime of assault in the third degree in terms similar to the Information. That instruction reads:

A person commits the crime of assault in the third degree when

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> he or she assaults another with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, or assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

Jury Instruction No. 3, Record at 63. This instruction is somewhat confusing due to the number of times the word "or" appears. However, it seems to list two ways that a person may commit an assault. First, assault of another person with the "intent to prevent or resist" is one of the listed actions that can give rise to a crime. Second, for assault a law enforcement officer, -- no intent provision is listed. The trial court provided a "to convict" instruction that clarifies Jury Instruction No. 3 somewhat and reads as follows:

> To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 1, 2016, the defendant assaulted Deputy Mathew Schlecht;
>
> (2a) That the assault was committed with intent to prevent or resist the execution of a lawful process or mandate of a court officer or the lawful apprehension or detention of the defendant or another person; or
>
> (2b) That at the time of the assault Deputy Mathew Schlecht was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
>
> (3) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (3) and either alternative element (2a) or (2b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2a) or (2b) has been proved beyond a reasonable doubt, as long as each juror finds that either (2a) or (2b) has been proved beyond a reasonable doubt.

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> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Jury Instruction No. 4, Record at 64. The first required element is that there be an assault. However the instruction clearly provides two alternate options for convicting the defendant of assault in the third degree. This creates confusion for the jury because of the differing intent requirements within the two options. In (2b), the element requires the "intent to prevent or resist the execution of a lawful process or mandate of a court officer," while in (2c), no intent is required. The jurors were also informed prior to trial that Mr. Smith was charged with assault in the third degree, in that

> the defendant, with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of him or herself or another person, did assault another and/or (2) did intentionally assault a law enforcement officer or other employee of a law enforcement agency who was performing his official duties at the time of the assault.

VRP at 16. Essentially, the jury was told at the beginning that the required intent on the first alternate was the "intent to prevent or resist," and the required intent on the second alternative was the "intent to assault a law enforcement officer." However, after the jurors went through the entire trial under this assumption. It was only when jury instruction no. 4 was given that the "intent" requirement was removed from the second option without explanation. Additionally, although an assault is listed as an element, it is not stated that "intent" to commit the assault is actually an element of the crime that the State is required to prove. *State v. Byrd*, 125

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Wn.2d 707, 713, 887 P.2d 396 (1995); *State v. Coates*, 107 Wn.2d 882, 890, 735 P.2d 64 (1987).

The trial court did include a definition of assault in its instructions to the jury. Jury Instruction No. 5 was the standard instruction and states:

> An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Record at 65. Jury Instructions No. 3 defines assault in the 3rd degree. It does not define assault as a separate act requiring intent. The same is true for Jury Instruction No. 4, which purports to tell the jury what elements of the charged crime necessary to convict. Only the trial court's opening instructions listed "intent" as part of the assault portion of the charge and only for the second portion. However, in Jury Instruction No. 4 "intent" is eliminated as an element of the crime. Eventually, the jury is given a definition of assault that includes the word 'intent,' but nowhere are the jurors told that intent is an element that the State must prove beyond a reasonable doubt in order to convict. The only intent mentioned in the "to convict" instruction (Jury Instruction No. 4) is the "intent to prevent or resist." Nor is the jury told that an 'assault' actually has its own elements that must also be proved by the State. As a result, the jury is left to discover for themselves that the assault element in the "to convict"

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instruction has its own elements. They would also have to determine, on their own initiative, which they have told not to do (VRP at 20, 23), that the State has to prove beyond a reasonable doubt that the defendant committed each of the elements listed in Jury Instruction No. 5. This requires the jury, on their own initiative, to decipher each of the elements listed in Jury Instruction No. 5. If the jury manages to do this and ignore the fact that there is no "to convict" requirements for the assault definition, the jury might come up with something like this:

> An assault is an:
> 1. intentional touching or striking of another person
> 2. that is harmful or offensive regardless of whether any physical injury is done to the person.
> 3. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
>
> OR
>
> 1. an act
> 2. done with the intent to create in another apprehension and fear of bodily injury, and
> 3. which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Now the jury is faced with three additional elements that are not part of the elements they were told the state was required to prove beyond a reasonable doubt, and they still have to apply the definition of intent given in Jury Instruction No. 6 (Record at 66) to the intent for assault. Interestingly, the second option in Jury Instruction No. 5 appears to have an intent requirement different from the first and that is similar in form to the "intent to prevent or resist" requirement of the "to convict" instruction. The intent appears not to be the intent to commit the act, but the intent to

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cause "apprehension and fear." So, now the jury must determine whether the intent element applies to the assault element in (1) of Jury Instruction No. 4; or to elements (2a) and (2b); or is there an intent element for (1) with multiple intent elements for (2a) and no intent for (2b); or multiple intent elements for all three; or some other combination? It is unlikely that the jury would do any of the above. The jury would be more likely to take the "to convict" instruction and determine that the necessary intent in (2a) is simply the "intent to prevent or resist" and that (2b) is simply a strict liability provision where the State must simply show that the intended victim was a "law enforcement officer." RCW 9A.36.031(g).

This confusion becomes more important when the defense of voluntary intoxication, is taken into consideration. The defense requested and received the following instruction:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Jury Instruction No. 7, Record at 67. Under these circumstances, considering the other instructions, the voluntary intoxication instruction raises two concerns. First, the use of the word "may" implies that the jury may disregard any evidence of involuntary intoxication, which effectively absolves the State of the obligation to prove intent. *State v. Hayward*, 152 Wn.App. 632, 641 - 642, 217 P.3d 354 (Div. 2 2009) ("It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a

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reasonable doubt."). Second, it is not clear to the jury what "intent" the instruction is referring to. Is it referring to the intent required for assault in general, or the "intent to prevent or resist," or something else? If the jury cannot determine how they are to apply the instruction, then the State is relieved of its requirement to prove intent *Id.* The defendant is also deprived of his ability to argue his theory of the case because his defense is based on the fact that he could not form the specific intent to commit the crime and that element is no longer one that the State must prove or the jury has be told that it can ignore it. Jury instructions are only "proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *Id.*, at 641 citing *State v. Barnes,* 103 P.3d 1219, 153 Wn.2d 378, 382 (Wash. 2005).

In the current case, the instructions do not properly inform the jury that the State had to prove beyond a reasonable doubt that Mr. Smith intended to commit an assault rather than just the "intent to prevent or resist." Further, the instruction did not adequately communicate to the jury that if Mr. Smith could not be convicted if he was too intoxicated to form the intent to commit an assault. Because the jury instructions are insufficient under these facts that Court should reverse and remand.

III. If the State is not required to prove intent, then Mr. Smith recieved ineffective assitance of counsel because the attorney failed present evidence to prove Mr. Smith was too intoxicated to form intent.

The evidence presented by the State is overwhelming that Mr.

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Smith was so intoxicated that he could not legally form the intent to commit an assault. The State's witnesses provided extensive testimony to show that Mr. Smith was "incapacitated or gravely disabled by alcohol" and justify Detective Schlect's decision to place Mr. Smith in protective custody as required by RCW 70.96A.120(2). Mr. Smith also testified in his own behalf that he could not remember anything that happened with the officers. VRP at 124. However, if such evidence is insufficient to show that the defendant was incapable of forming the required intent to commit an assault, then the result is that the defendant is required to provide expert testimony and affirmatively prove he was too intoxicated to form intent, in conflict with *State v. Gabryschak*. In this case, such a ruling would raise the issue of ineffective assistance of counsel because the defense attorney failed to present the only evidence that might have allowed the defendant to prevail on his theory of the case, voluntary intoxication.

To establish a claim for ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Deficient performance is that which falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland,* 899 P.2d 1251, 127 Wn.2d 322, 334-35 (Wash. 1995). Prejudice is shown by demonstrating "a reasonable probability that, but for counsel's

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unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 162 P.3d 1122, 161 Wn.2d 1, 8 (Wash. 2007). If a party fails to satisfy one element, a reviewing court need not consider both. *State v. Foster,* 140 Wn.App. 266, 273, 166 P.3d 726 (2007). There is a strong presumption that counsel performed adequately. *Strickland v. Washington,* 466 U.S. at 689-91. The defendant must also show in the record the absence of a legitimate strategy or tactical reason supporting the lawyer's challenged conduct. *State v. Mannering,* 150 Wn.2d 277, 286, 75 P.3d 961 (2003).

In this case, the defense attorney correctly identified voluntary intoxication as a proper defense and requested an instruction on voluntary intoxication. Voluntary intoxication was the defense's sole theory of the case. The only way Mr. Smith could prevail was by showing that Mr. Smith was too intoxicated to form the necessary intent. However, the defense presented no evidence beyond the testimony of the State's witnesses that Mr. Smith was too intoxicated to form the *mens rea* to commit an assault. The defense called two witnesses, Mr. Collins and Mr. Smith. Mr. Collins' testimony agreed with that of the officers, except that he thought that Mr. Smith "fell forward" into the officers rather than lunged, and a few other minor details. VRP at 117. Mr. Smith testified in his own behalf about why and how much he was drinking, but could not remember anything about his interactions with law enforcement on that night. VRP at 127 -130. With the exception of Mr. Smith's blackout, this

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testimony added nothing to the State's evidence relating to Mr. Smith's mental state at the time of the alleged assault. The defense did not call any medical experts, though these witnesses were available, to discuss Mr. Smith's ability to form the necessary culpable mental state.

If the defense is required to affirmatively prove voluntary intoxication then the failure to present expert medical testimony relating to Mr. Smith's ability to form the necessary culpable mental state demonstrates that the defense attorney's performance fell "below an objective standard of reasonableness based on consideration of all the circumstances." This is because failure to present expert testimony made it impossible to prevail in a voluntary intoxication case. Prejudice is shown because there is "a reasonable probability that, but for" the failure to present expert testimony, the defendant would have prevailed. If this were not so then there would be no evidence that the defense could ever present absent coma or death that would be sufficient to prevail under any circumstances and there would no longer be a voluntary intoxication defense in any circumstances. This would effectively invalidate RCW 9A.16.090. Additionally, there is no "legitimate strategy or tactical reason" that would justify the failure to present the expert evidence because success in a voluntary intoxication defense would be impossible without the evidence.

Additionally, defense counsel failed to raise any objections as to the form of the instructions, which failed to mention RCW 70.96A.120(2).

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The fact that the officers had determined that Mr. Smith met the legal requirements of RCW 70.96A.120(2) in that Mr. Smith was "incapacitated or gravely disabled by alcohol," allowing them to place him in protective custody was not explained to the jury. Since this is a statutory definition that clearly satisfied the requirements of the voluntary intoxication defense, it should have been explained to the jury in an instruction, or the trial court should have found, as a matter of law that the testimony presented by Detective Schlecht and the other officers was sufficient unrefuted evidence that Mr. Smith was too intoxicated to form the requisite intent. Absent any evidence to the contrary, the court erred in not explaining the issue to the jury because the jury could not address the legal issue without assistance. Without the legal knowledge to understand that Detective Schlecht had effectively testified that Mr. Smith was "incapacitated or gravely disabled by alcohol," it would be impossible for the jury to recognize or properly consider the issue. Nor could the jury properly determine whether Mr. Smith was too intoxicated to form the required intent. "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (Div. 2 2009) citing *State v. Barnes,* 103 P.3d 1219, 153 Wn.2d 378, 382 (Wash. 2005). The failure of the defense attroney to request an instruction or to ask the trial court to rule on the issue, or move for a dismissal at the end of the State's case is ineffective

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assistance of counsel because there was no legitimate strategy or justification for not doing so, as it was absolutely vital to the defendant's case. Further, because voluntary intoxication defense was the sole issue the failure to take these actions made success impossible, and this in turn means that there is a reasonable probability that the outcome would have been different, had the issue been raised.

If the defense is required to prove voluntary intoxication, then the failure to present evidence to prove the defense is ineffective assistance of counsel. Further, even if the State had presented some evidence sufficient to shift the burden back to the defense, the failure to present expert evidence to prove the defense of voluntary intoxication is ineffective assistance of counsel.

CONCLUSION

The State not only failed to prove that Mr. Smith formed the required intent to commit the crime of assault, the State actually presented evidence Mr. Smith was too intoxicated to form the required intent and had to be placed in protective custody pursuant to RCW 70.96A.120(2). Further, because the State failed to present any evidence that Mr. Smith intentionally assaulted a law enforcement officer, there was insufficient evidence to support a conviction. The Court should vacate Mr. Smith's conviction and order a dismissal of all charges against Mr. Smith.

The jury instructions were confusing and misleading because they did not require the State to prove that the defendant intended to commit an

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assault and relieved the State from the burden of proving the element of intent. The Court should vacate Mr. Smith's conviction and remand for a new trial with instructions to correct the errors in the jury instructions.

If the defense was required to prove that Mr. Smith's intoxication prevented him from forming the intent to commit a crime, then the defense attorney failed to provide sufficient and proper legal representation because the attorney failed to present any evidence, including expert witnesses, that Mr. Smith was incapable of forming intent. Because the voluntary intoxication defense was the sole defense to the charges, there is no legitimate strategy or tactical reason supporting the lawyer's failure to present such evidence to the jury. Because of the ineffective assistance of counsel, the court should vacate Mr. Smith's conviction and remand for a new trial.

DATED this 7th day of November, 2016.

Eugene C. Austin, WSBA # 31129
Attorney for Defendant/Appellant

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of the foregoing was sent, via

Emailed to. the Lewis County Prosecutors Office at appeals@lewiscountywa.gov

Mailed to: Dale Smith
Defendant
270 Collins Rd
Toledo, WA 98591

DATED this 7th day of November, 2016.

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